82-1204

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WER-COY FABRICATION COMPANY, INC.

-VS-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM L. HOOTH
ANDREW T. BARAN
Business Address:
3001 West Big Beaver
Suite 624
Troy, Michigan 48084
Telephone: (313) 649-4455
COUNSEL FOR PETITIONER

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

NO.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982

WER-COY FABRICATION COMPANY, INC.

-VS-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Wer-Coy Fabrication Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

1. Whether a clause in a collective bargaining agreement which creates different and more stringent standards for the termination of union stewards than for the termination of other employees is discriminatory with respect to terms and conditions of employment in violation of sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) and (b)(2)?

2. Whether summary judgment could properly be granted to a union seeking to enforce an arbitration award based on such a clause without a showing of a legitimate and substantial business justification for the clause?

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OPINIONS BELOW

The Order entered in this case by the United States District Court for the Eastern District of Michigan is reproduced at Appendix p. 1a The Order entered by the Circuit Court of Appeals is reproduced at Appendix p. 3a

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming the Summary Judgment granted by the United States District Court for the Eastern District of Michigan was entered on October 22, 1982. This Petition is filed within 90 days of said Order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §158(a)(3)

(a) It shall be an unfair labor practice for an employer— . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

29 U.S.C. §158(b)(2)

(b) It shall be an unfair labor practice for a labor organization or its agents— . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .

STATEMENT OF THE CASE

For a number of years, Sheet Metal Workers International Association, Local Union No. 292 (hereinafter "Local 292") has had a collective bargaining agreement with the Associated Metal Fabricators and Contractors (hereinafter "Association"). In 1979, Wer-Coy Fabrication Company, Inc. (hereinafter "Wer-Coy") became a member of the Association and was bound by the terms of the collective bargaining agreement then in effect between the Association and Local 292.

On August 5, 1980, Oscar Werden, president of Wer-Coy, discharged its union steward. A grievance seeking the reinstatement of the steward was subsequently filed and processed to arbitration. The arbitrator concluded that under Section 5(k) of the collective bargaining agreement between the parties (App. p. 5a) union stewards could be discharged only for just cause, and that Wer-Coy had not had just cause to discharge its steward. He ordered the reinstatement of the steward.

Wer-Coy refused to do this. Local 292 then filed an action under Section 301 of the Labor-Management Relations Act of 1947, in the United States District Court for the Eastern District of Michigan to compel Wer-Coy to abide by the arbitration award. Wer-Coy put forth a number of reasons for its refusal. Among these was its contention that the contract clause upon which the arbitration award was based was illegal, because it discriminated unfairly in favor of union membership in contravention of the Labor-Management Relations Act. The clause in question provided that union stewards could be discharged only for just cause; other employees were not provided with any such protection and could be discharged at will. The District Court rejected Wer-Coy's arguments. It conceded that the question of the legality of the contract clause was troublesome, but stated that presumption in favor of an arbitration award should be indulged (App. p. 7a) Accordingly, it granted Local 292's motion for summary judgment for enforcement of the award.

Wer-Coy timely filed an appeal of the District Court's decision with the United States Court of Appeals for the Sixth Circuit. The Court of Appeals concluded that the contractual provision challenged by Wer-Coy was designed only to protect employees from discrimination because of their assumption of responsiblity in the union. It therefore affirmed the judgment of the district court below.

REASONS FOR THE ALLOWANCE OF THE WRIT

THE RULINGS OF THE COURTS BELOW IN THE INSTANT CASE, THAT A CLAUSE IN A COLLECTIVE BARGAINING AGREEMENT WHICH CREATES A DIFFERENT AND MORE RIGOROUS STANDARD FOR THE TERMINATION OF UNION STEWARDS THAN FOR THE TERMINATION OF OTHER EMPLOYEES IS NOT ILLEGAL AND IS A PROPER BASIS FOR AN ARBITRATION AWARD, IS CONTRARY TO THE REASONING OF OTHER COURTS AND THE NATIONAL LABOR RELATIONS BOARD AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

1. The disputed contract clause is illegal and cannot form the basis for a valid arbitration award.

A. The requirements of the Labor-Management Relations Act.

The Labor-Management Relations Act prohibits discrimination by employers with respect to terms and conditions of employment for the purpose of encouraging membership in a union, 29 U.S.C. § 158(a)(3). Indeed, any such action would be an unfair labor practice, 29 U.S.C. § 158(b)(2). This Court has ruled that discrimination which encourages employees to be "good" union members is violative of the law. *Radio Officers Union* v *NLRB*, 347 U.S. 17 (1954).

> It is well settled that "membership" as used in Section 8(a)(3) refers not only to the employee's basic decisions as to whether to join or remain in a union, but also to his decisions as to the level of his participation in the union and union activities . . . Thus, actions encouraging or discouraging service as a union steward clearly fall within the scope of Section 8(a)(3). *Teamsters, Local 20* v *NLRB*, 610 F2d 991, 993 (D.C. Cir. 1979).

B. Prior Decision of the National Labor Relations Board and Other Courts of Appeal.

Of course, the National Labor Relations Board has primary responsibility for interpreting and applying the provisions of the Labor-Management Relations Act. The Board has considered and ruled on the legality of various kinds of contract clauses providing special benefits to union stewards or other officials. Its most important ruling in this area was in the case of *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), *enfd.*, 531 F2d 1162 (2d Cir. 1976).

In *Dairylea*, the Board had to decide whether a contract clause which gave union stewards top seniority with respect to all contractual benefits where seniority was a consideration was legal. The Board concluded:

> It has not, however, been established in this case or elsewhere that superseniority going beyond layoff and recall serves any aim other than the impermissable one of giving union stewards special economic or other on-the-job benefits solely because of their position in the Union . . . we do find that superseniority clauses which are not on their face limited to layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e. establishing justification) rests on the shoulders of the party asserting their legality. 219 NLRB at 658.

Later Board rulings have made clear that the *Dairylea* rationale cannot be restricted to only those clauses dealing

with seniority rather than other types of contractually provided benefits. In *Plumbers, Local 119*, 255 NLRB 1056 (1981), for instance, the Board found the enforcement of a provision granted stewards an additional payment of 75 cents per hour to be an unfair labor practice. Because the contract benefit was available only to stewards, it was, in effect, an infringement on the rights of other employees.

Various courts of appeal have affirmed the Board's reasoning in *Dairylea*. *Dairylea* itself was enforced in *NLRB* v *Teamsters, Local 338*, 531 F2d 1132 (2d Cir. 1976). In that case, the Second Circuit noted that the policy of Section 8(a)(3) and 8(b)(2) was to insulate the jobs of employees from their organizational rights, and that the union could provide other incentives if such were needed to attract and retain stewards. *See also NLRB* v *American Can Co.*, 658 F2d 746 (10th Cir. 1981); *Teamsters, Local 20* v *NLRB*, *supra*. Courts have stressed that to justify a clause not limited to superseniority for purposes of layoff and recall, a union must make a specific showing of both a legitimate and a substantial interest in such a clause. *Paintsmiths, Inc.* v *NLRB*, 620 F2d 1326 (8th Cir. 1980).

The most relevant case with regard to the issues raised in the instant proceeding is *Perma-Line Corp.* v *Painters, Local 230*, 639 F2d 890 (2d Cir. 1980). In *Perma-Line*, the union had filed a grievance over the discharge of a steward. The contract provided that stewards could not be discharged without the consent of the union; other employees were not provided with similar protection. During arbitration, the employer argued that this provision did not cover discharges for cause, but the arbitrator nonetheless ordered the steward's reinstatement. The employer then petitioned the district court to set aside the arbitration award, contending that the arbitrator's decision was improper and that the clause upon which it was based was presumptively illegal under Sections 8(a)(3) and 8(b)(2) as a glorified superseniority clause. The court agreed that the arbitrator had incorrectly interpreted the collective bargaining agreement, but

felt bound to defer to the arbitration award. It also ruled that the disputed clause was not plaintly contrary to federal labor law.

On appeal, the Second Circuit reversed on both of these issues. It began its review by noting that a provision of a collective bargaining agreement which violated the National Labor Relations Act was both void and unenforceable and could not properly be the basis of an arbitration award, regardless of the arbitrator's decision. Because of this, when an award was based on such a clause, a reviewing court had the duty to step in and vacate the award as contrary to public policy. Supporting authority from four other circuits for this proposition was cited.

Turning to the contract clause at issue, the court found that because of the preferential treatment it granted stewards with regard to discharge, the clause encouraged employees to be "good" union members. "Such protection is the ultimate benefit a union can give to a union member". 639 F2d at 896. The court concluded that this was a "superseniority clause *ne plus ultra*" *Id*, and presumptively illegal absent a showing by the union which justified the provision.

C. The contract clause challenged by Wer-Coy.

It is clear that the clause challenged by Wer-Coy is a presumptively illegal superseniority clause under the criteria set out by *Dairylea* and its progeny. The clause does not even address the issues of layoff and recall, but simply creates one standard for the treatment of stewards in discharge situations and a different, lower standard for all other employees. It thus confers a direct job-related benefit which is available only to stewards and is obviously dependent upon union status. This is precisely the sort of inducement which is suspect under federal law and the decisions discussed above. Under *Dairylea* and *Perma-Line* there is therefore a burden placed on the union to justify this clause by showing a legitimate and substantial justification for it.

D. The decisions below with respect to the contested clause.

Although the issue was timely raised, the district court below did not require the union to and the union did not make any showing of a legitimate and substantial interest in enforcing the clause requiring just cause for the discharge of union stewards only, as is required under *Dairylea*. Therefore, the union never rebutted the presumptive illegality of a clause which conferred direct job-related benefits beyond superseniority for purposes of layoff and recall upon its stewards. Rather than applying the *Dairylea* standards, the court simply indicated that it would defer to the arbitration award (App. p. 7a)—an erroneous course also followed by the district court in *Perma-Line*. As established in the Second Circuit's decision in *Perma-Line* and the cases cited therein, such deference to the arbitration process is proper only if the provisions upon which the decision is based do not contravene federal law or public policy. When this is not the case, courts may not abdicate their responsibility and, by default, ratify the enforcement of illegal contract clauses. This principle would have been obvious had the clause in question discriminated on the basis of race or sex. It is equally applicable when the discrimination is based on union status.

Rather than ordering this matter to be returned to the district court level to require Local 292 to justify this presumptively illegal clause, the Sixth Circuit apparently simply reached an independent conclusion that the clause was "a mutually satisfactory means of protecting an employee from discrimination because of his assumption of responsibility in the Union." App. p. 4a Even had there been an adequate record developed below and an actual showing of justification made by the union, this would have been error, since there existed an issue of law, properly to be resolved by the district court. *See* discussion *infra*. However, in fact there had been no showing made before the district court, nor, of course, had evidence on this issue been introduced before the Court of Appeals. In addition, it

does not appear from a reading of the decision that any burden was placed on Local 292 to justify the contested clause. This contrasts sharply with the approach of the Second Circuit in *Perma-Line*, where the case was remanded to allow the development of an adequate record.

By ruling as it did, the Sixth Circuit disregarded NLRB precedent and split with other circuits on an important issue of federal labor law. It allowed a presumptively illegal contract clause to form the basis of an arbitration award without requiring any justification of the clause and indeed without the presentation of testimony or other evidence as to the necessity or interpretation of the clause. The ruling of the Sixth Circuit was erroneous, and this Court should accept this writ to resolve the issues of federal labor law raised by it.

2. Summary judgment in favor of the union could not properly be granted until the presumptive illegality of the clause was rebutted.

A. Proper standard for summary judgment.

The proper standard for the granting of a Motion for Summary Judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure. The Motion is to be granted if, from the record it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law." In ruling on such a Motion, the court is to "look at the record on Summary Judgment in the light most favorable to . . . the party opposing the motion." *Poller* v *Columbia Broadcasting System, Inc.*, 368 US 464, 473 (1962); *Fitzke* v *Shappell*, 468 F2d 1072 (6th Cir. 1972).

The party opposing the motion is to have his allegations taken as true and to receive the benefit of the doubt when his assertions conflict with those of the movant. *Bosely* v *City of Euclid*, 496 F2d 193 (6th Cir. 1974) (quoting 10 Wright & Miller, *Federal Practice and Procedure*, §2716 at 430-32) "[T]he papers supporting the movant are closely

scrutinized, whereas the opponent's are indulgently treated". *Bohn Aluminum and Brass Corp.* v *Storm King Corp.*, 303 F2d 425, 427 (6th Cir. 1962) (quoting 6 *Moore's Federal Practice* Par. 56-15 (3), pp. 2123-2126) The facts supporting the motion are to establish the non-existence of any genuine issue as to a material fact and the movant must also show his entitlement to a judgment as a matter of law. *Bloomgarden* v *Coyer*, 479 F2d 201 (D.C. Cir. 1973). The court has the power to look at any evidential source to determine whether such an issue exists. *Mintz* v *Mathers Fund, Inc.*, 463 F2d 495 (7th Cir. 1972).

B. Summary judgment in this matter was improper, because the moving party was not entitled to a judgment as a matter of law.

As indicated above, at the time summary judgment is granted, the moving party must have established that it is entitled to the judgment as a matter of law. Therefore, under established precedent, one of the prerequisites would have been the establishment of a legitimate and substantial interest in the maintenance and enforcement of the presumptively illegal contract clause challenged by Wer-Coy. Of course, as has been described, this was never done because it was not required by the district court, which chose to simply defer to the arbitration award.

The court is empowered to look to all sources to insure there are no obstacles to a summary judgment. In this case, the dispute as to the validity of the clause was already a part of the record before the court. The dispute raised a significant and material legal issue which had to be resolved before summary judgment could properly be granted. *See Perma-Line, supra.* In light of the presumptive illegality of the disputed clause, mere deferrence to the arbitration opinion (which had not even addressed this issue) was improper. Because this presumptive illegality was never rebutted by Local 292, it could not have been entitled to judgment in its favor as a matter of law. For this reason, the decision of the district court as affirmed by the Sixth Circuit was erroneous and should be reversed.

CONCLUSION

The decisions of the courts below in this proceeding are erroneous in at least two respects. First, mere deferral to the arbitration process is improper where the contract clause upon which the decision was based is contrary to federal labor law or established public policy. A clause which confers job related benefits to union stewards beyond superseniority for purposes of layoff and recall is presumptively illegal under the National Labor Relations Act. Where, as here, the arbitration decision which is sought to be enforced is presumptively illegal, the party seeking enforcement has to establish a legitimate and substantial interest in the clause to rebut the presumption. Accordingly, the courts below erred in not requiring Local 292 to rebut the presumption of illegality but rather simply accepting the arbitration award or, in the case of the court of appeals, making an improper decision as to the merits of the clause without any basis for such a ruling in the record of the case.

The error as to the applicable standard to use in determining whether to enforce the arbitration award was compounded by the granting of a summary judgment at a time when the moving party was not entitled to a judgment as a matter of law, because it had not established the legality of the contract clause underlying the arbitration decision.

The rulings of the courts below contradict or ignore relevant precedent from the National Labor Relations Board and other courts of appeal. They raise significant issues of federal labor law. For these reasons, the petitioner asks that this Court grant its writ.

Respectfully submitted,

COX, HOOTH & CURLEY
William L. Hooth (P 15113)
By: Andrew T. Baran (P 31883)
Business Address:
3001 W. Big Beaver Road
Suite 624
Troy, Michigan 48084
Telephone: (313) 649-4455

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DECISION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO, a labor organization,
Plaintiff and Counter Defendant,

-VS-

WER-COY FABRICATION COMPANY, INC., a Michigan Corporation,
Defendant and Counter Plaintiff.

Case No. 81-71144

HONORABLE JOHN FEIKENS

ORDER

At a session of said Court held in the Federal Courthouse, Detroit, Michigan on July 7, 1981

PRESENT: Hon. John Feikens
U. S. District Judge

This matter having come on to be heard on July 7, 1981, on plaintiff's Motion for Summary Judgment on the Complaint and Summary Judgment of Dismissal on a Portion of the Counterclaim and on defendant's Motion for Summary Judgment, and the Court having considered the pleadings filed herein and the arguments of attorneys for both parties and being fully advised in the premises, it is

ORDERED, that defendant's cross-motion for summary judgment be and the same hereby is denied, and it is further

ORDERED, that plaintiff's motion for summary judgment on the complaint and summary judgment of dismissal on that portion of the counterclaim which purports to state a claim under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for plaintiff's alleged breach of its collective bargaining agreement be and same hereby is, in all respects, granted, and it is further

ORDERED, pursuant to Rule 54(b) F.R.C.P., that final judgment be entered upon the complaint and that portion of the counterclaim which purports to state a claim for damages under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for plaintiff's alleged breach of its collective bargaining agreement and the undersigned expressly determines that there is no just reason for delay in the entry of final judgment on this order.

(s) John Feikens
United States District Judge

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-1514
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO, a labor organization,
Plaintiff/Counter Defendant-Appellee,

v.

WER-COY FABRICATION COMPANY, INC., a Michigan corporation,
Defendant/Counter Plaintiff-Appellant.

ORDER
(Filed: October 22, 1982)

Before: ENGEL and KEITH, Circuit Judges; and HOGAN, Senior District Judge*

Wer-Coy Fabrication Company, Inc. appeals a final judgment of the district court, entered pursuant to Federal Rule of Civil Procedure 54(b), enforcing an arbitrator's award which directs the immediate reinstatement with back wages of Anthony Dubich, a Union steward who was discharged from employment August 5, 1980. The company has alleged before the district court and here that the award was not within the power of the arbitrator whom the parties chose to resolve the grievance. The company has further claimed that it was error for the trial judge to have entered a summary judgment without first permitting the company to introduce evidence that Section 5(J) of the collective bargaining agreement was violative of the National Labor Relations Act.

* Hon. Timothy J. Hogan, Senior Judge, U.S. District Court for the Southern District of Ohio, sitting by designation.

The court is of the opinion that the district court did not err in granting summary judgment under the circumstances here. It is apparent that the decision of the arbitrator drew its essence from the collective bargaining agreement in holding that Section 5(J) made grievable and arbitrable the question whether the steward's termination was without just cause. Further, the company's reliance upon *Perma-Line* v. *Painters Local 230*, 689 F.2d 890 (2d Cir. 1981), is misplaced. Whatever may be the validity of that decision, it is apparent that the circumstances therein are far different from those in the present case. The individualized provisions made under this contract with respect to shop or job stewards conferred neither any such seniority nor other economic benefit, but were narrowly tailored to provide a neutral and mutually satisfactory means of protecting an employee from discrimination because of his assumption of responsibility in the Union. Accordingly,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

SECTION 5(k) OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE ASSOCIATED METAL FABRICATORS AND ENGINEERS AND S.M.W.I.A. LOCAL UNION 292

Section 5. STEWARDS

* * *

K. The Employer shall notify the Union office seventy-two (72) hours, excluding Saturday, Sunday and holidays, prior to the discharge of a shop or job steward for cause. The Union will investigate (within the seventy-two (72) hour period) and determine the discharge of any steward for cause.

* * *

Excerpt from Transcript of July 7, 1981

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEET METALWORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO, a labor organization,
Plaintiff,

-vs-

Civil Action No. 1-71144

WER-COY FABRICATION COMPANY, INC., a Michigan corporation,
Defendant.

EXCERPT FROM THE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE JOHN FEIKENS ON TUESDAY, JULY 7, 1981

Proceedings had in the above-entitled cause before the HONORABLE JOHN FEIKEN, Chief United States District Judge, at Detroit, Michigan, on Tuesday, July 7, 1981, commencing at or about the hour of 3:00 P.M.

APPEARANCES:

MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C.
BY: Ann E. Neydon, Esq.
1000 Farmer Street
Detroit, Michigan 48226 (313) 965-3464
appearing on behalf of Plaintiff.

FIOTT & NOVARA, P.C.
BY: Kenneth J. Fiott, Esq.
One Parklane Boulevard
Parklane Towers West, Suite 1427
Dearborn, Michigan 48126 (313) 336-4465
appearing on behalf of Defendant.

Excerpt from Transcript of July 7, 1981

THE COURT: In this case the Plaintiff has brought an action under the Labor Management Relations Act, 29 USC 185 to enforce an arbitration award. Defendant counterclaims for damages resulting from the Union's violation of the no-strike clause, unfair labor practices, first under Section 301, the second under Section 303. The Plaintiff moves for Summary Judgment on its claim, and on Defendant's Section 301 claim. Defendant moves for Summary Judgment on Plaintiff's claim only.

Now, with regard to the Plaintiff's claim, the enforcement of the arbitration award, it is settled law that arbitration awards are heavily favored.

In these cases the Defendant put three arguments as to why it should not be enforced. Initially the Defendant raises that the issue of just cause was not submitted to arbitration. But I think that this is not sustained by the record in the case and the colloquoy in which I have just engaged with Defendant's counsel, in which it appears that the issue was raised before the arbitrator, and, indeed, was briefed.

Defendant says that the award was not based on evidence. The arbitrator's opinion is attached to the file, and reference to it at pages 19 and 20 makes it clear that the arbitrator is saying that the discharge occurred in the midst of a confusing confrontation without substantial proof of justification, the arbitrator ruled that the Defendant did not meet the burden of proving just cause.

So, it appears that the arbitrator's conclusion comes from the contract, and it was based on evidence submitted at the hearing.

The third point that the Defendant raises is that the award is based on an illegal interpretation of the contract. While this may be a bit more troublesome, I think that the presumption in favor of the arbitrator's award should be indulged.

Excerpt from Transcript of July 7, 1981

And to define here that the sentence in the arbitrator's award ought to be construed as an illegal interpretation of the contract, that, I do not believe has merit.

Plaintiff also argues that Defendant's 301 claim should be the subject of summary judgment. And again here it would appear that both the employer as well as the Union must exhaust grievance procedures before bringing 301 suits into this Court.

Thus, I rule that summary judgment should be granted for Plaintiff on its claim for specific performance of the arbitration award, and that claim one of the Defendant's Counter-Claim should be dismissed without prejudice for failure to exhaust any contract remedies.

Count two of the Counter-Claim is not involved in these Motions.

You may have an Order.

REPORTER'S CERTIFICATE

I, ROSS L. PALMER, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

(s) ROSS L. PALMER

DATED: Detroit, Michigan
September 8, 1981

No. 82-1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WER-COY FABRICATION COMPANY, INC.,
Petitioner,

-vs.-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C.
By: ROLLAND R. O'HARE
ANN E. NEYDON
BRUCE A. RICHARD
Attorneys for Respondent
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

THE INLAND PRESS, DETROIT, MICHIGAN
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No. 82-1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WER-COY FABRICATION COMPANY, INC.,
Petitioner,

-vs.-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Sheet Metal Workers International Association, Local Union No. 292, AFL-CIO, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's decision in this case.

STATEMENT OF THE CASE

In 1979, petitioner Wer-Coy Fabrication Company, Inc. (hereinafter "Wer-Coy") joined the Associated Metal Fabricators and Engineers (hereinafter "AMFE"), and gave it a power of attorney to negotiate on Wer-Coy's behalf, thereby becoming bound to the collective bargaining agreement negotiated between the AMFE (which acts as bargaining agent for its member-employers) and respondent Sheet Metal Workers International Association Local Union No. 292, AFL-CIO (hereinafter the "Union") and then in effect. Wer-Coy later became bound to a successor contract negotiated by the AMFE and the Union effective June 1, 1980. Section 5(D) of the Addendum to these agreements (App., p. 1a) prohibits Wer-Coy from

discriminating against Union stewards in its shop in the performance of their duties; Section 5(K) of the Addendum (App., p. 1a; Petition, App., p. 5a) requires that Wer-Coy have just cause to discharge a steward.

On August 5, 1980, Wer-Coy discharged Anthony Dubich, a Union steward. The steward's discharge was later arbitrated under the agreement between Wer-Coy and the Union. In his Award (App., p. 2a), the arbitrator ordered the steward reinstated with back pay and benefits on three alternative grounds: that the discharge was "improper" (that is, it was without just cause); that the steward was discharged while "he was legitimately trying to perform his duties as a Union steward", and that he was discharged in violation of this Court's rule in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 US 251, 256 (1975) that an employee be permitted union representation upon request when he reasonably believes that an interview with his employer may result in discipline. The arbitrator did *not* decide whether the contract required that Wer-Coy have just cause to discharge employees other than stewards.

Wer-Coy refused to abide by the arbitrator's Award. The Union then brought the present action in the U.S. District Court for the Eastern District of Michigan for enforcement under 29 USC §185. In its Answer to the Union's Complaint, Wer-Coy did not plead any defense of illegality to the enforcement of the Award (App., pp. 3a-5a). But later, in resisting the Union's motion for summary judgment, Wer-Coy argued that §5(K) of the agreement, upon which the arbitrator's holding that the discharge was without just cause rested, illegally discriminated in favor of the steward on the basis of union membership. Wer-Coy did not challenge the legality of the arbitrator's alternative grounds for ordering reinstatement. The District Court, however, held that the Award as a whole came within the presumption favoring enforcement of arbitration awards and granted the Union's motion (Petition, App., pp. 7a-8a).

Wer-Coy appealed to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit held, *inter alia*, that §5(K) of the agreement provided no seniority or other economic benefit to a union steward but simply protected the steward from discrimination by his employer (Petition, App., p. 4a).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NEITHER THE DECISIONS BELOW NOR THE RECORD RAISE THE QUESTIONS PRESENTED IN THE PETITION.

A. *Wer-Coy did not timely raise the affirmative defense of illegality in its Answer in the District Court below, and the question regarding the illegality of the contract which it seeks to present is not properly before the Court.*

The Petition claims, in essence, that "[t]he disputed contract clause is illegal and cannot form the basis for a valid arbitration award" (Petition, p. 3) and that the courts below therefore erred in granting and affirming summary judgment for the Union.

Wer-Coy, however, did not raise the affirmative defense of illegality by its Answer in the District Court below (App., pp. 3a-5a).

Under Rule 8(c) of the Federal Rules of Civil Procedure (App., p. 6a), "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . illegality." The defense of illegality in an action to enforce an arbitration award under a collective bargaining agreement is waived if not pleaded in the Answer as required by Fed. Rules Civ. Proc. 8(c). *International Brotherhood of Electrical Workers* v. *Professional Hole Drilling, Inc.*, 574 F2d 497, 500 (10th Cir., 1978). The question presented by the Petition, as to whether Section 5(K) of the agreement between Wer-Coy and the Union is illegal, is therefore not properly before this Court. Cf. *Weinberger* v. *Salfi*, 422 US 749, 764 (1975) (affirmative defenses not timely raised as

required by Fed. Rules Civ. Proc. 8(c) need not be considered by this Court).

B. *Regardless of the legality of the disputed clause, the courts below had independent and adequate grounds to enforce the arbitration award.*

Federal law and national labor policy strongly favor the making and enforcement of arbitration agreements as a means of preserving industrial peace. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 578 (1960). The scope of judicial review of an arbitration award is narrow, and a mere ambiguity in the award raising a question as to whether the arbitrator exceeded his authority is not a reason to deny enforcement of the award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 US 593, 596, 598 (1960). A party attacking the legality of an arbitration award has the burden of sustaining such an attack, *Ormsbee Development Co.* v. *Grace*, 668 F2d 1140, 1147 (10th Cir., 1982), and only clear evidence of impropriety justifies denial of summary confirmation. Id.; *National Bulk Carriers, Inc.* v. *Princess Management Co., Ltd.*, 597 F2d 819, 825 (2d Cir., 1979).

In this case, the arbitrator held that the steward must be reinstated not only because Wer-Coy did not have just cause to discharge him, but also because it discharged him in the course of his performance of his duties as a steward [a violation not only of §5(D) of the Addendum (App., p. 1a), but also of 29 USC §158(a)(3), see, e.g., *May Dept. Stores Co.* v. *N.L.R.B.*, 555 F2d 1338 (6th Cir., 1977)]; and because it discharged him in violation of his rights under *N.L.R.B.* v. *J. Weingarten, Inc., supra.* Wer-Coy does not object in this Court, and made no objection below, that these latter two grounds rested on any illegal contract provision. As the Courts below would clearly have been entitled to enforce an award of reinstatement resting on either of those grounds alone, they were also clearly entitled to enforce the Award as rendered despite

any ambiguity or question as to the legality of §5(K) of the contract, on the basis of the adequate and independent grounds for reinstatement set forth in it. The questions presented by the Petition, therefore, are hypothetical. Even if they were resolved in Wer-Coy's favor, the decisions below would still stand unchanged.

II.

THE DECISIONS OF THE COURTS BELOW ENFORCING THE ARBITRATION AWARD ARE IN HARMONY WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND THE NATIONAL LABOR RELATIONS BOARD: THE QUESTIONS PRESENTED BY THE PETITION, EVEN IF PROPERLY RAISED, ARE INSUBSTANTIAL.

A. *The courts agree that limited job-related benefits (such as superseniority for purposes of layoff and recall) which enable union stewards to maintain a continuous presence on the job are not unlawfully discriminatory under 29 USC § 158.*

Wer-Coy claims that while § 5(K) of the Addendum to the parties' agreement, as interpreted by the arbitrator, prohibits it from discharging union stewards without just cause, other employees are not so protected and may be discharged at will — and that this difference in treatment is of a type held presumptively unlawful and discriminatory by the National Labor Relations Board and Courts of Appeals other than the Sixth Circuit, thus creating a conflict between the circuits in this area of labor law.

Wer-Coy bases its argument on a line of cases stemming from *Dairylea Cooperative, Inc.*, 219 NLRB 656, 89 LRRM 1737 (1975), *enf'd sub nom. N.L.R.B.* v. *Milk Drivers, Local 338*, 531 F2d 1162 (2d Cir., 1976). In *Dairylea*, the NLRB held that a contract clause according a steward superseniority for all purposes, thus providing him with substantial job benefits seemingly unrelated to the performance of his responsibilities under the contract, was presumptively unlawful as impermis-

sibly encouraging union membership under 29 USC §§158(a)(3), 158(b)(2), and that the union would have to provide "proper justification" to rebut this presumption, 219 NLRB at 658.

The NLRB also held, however, that union steward superseniority limited to purposes of layoff and recall was of "well established" propriety and thus need *not* be specially justified by the union, because it

> furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. It thereby not only serves a legitimate statutory purpose but also redounds in its effects to the benefit of all unit employees. Thus, superseniority for layoff and recall has a proper aim and such discrimination as it may create is simply an incidental side effect of a more general benefit accorded all employees. *Id.* (footnote omitted).

In thus holding, the NLRB relied on *Aeronautical Industrial District Lodge 272* v. *Campbell*, 337 US 521 (1949), in which this Court held that:

> One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. . . . Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairmen [or stewards] play a very important role in the whole process of collective bargaining. Therefore, it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory. 337 US at 527-28.

As the Second Circuit noted in enforcing the NLRB's Order in *Dairylea*, "a union may find itself powerless to supply any real representation if it is unable to maintain the same steward continuously on the job." 531 F2d at 1166, n.7. Cf. *Paintsmiths, Inc.* v. *N.L.R.B.*, 620 F2d 1326, 1330 (8th Cir., 1980) (steward

superseniority clause limited to layoff and recall is presumptively lawful.) Other contractual measures which permit a steward's continued presence on the job, such as shift and overtime preference, are also lawful. See, e.g., *UAW Local 1331 (Chrysler Corp.)*, 228 NLRB 1446, 95 LRRM 1071 (1977).

B. *The disputed contract clause here does no more than ensure the continued presence of the steward on the job and is thus clearly lawful under Dairylea.*

In this case, §5(K) of the Addendum to the contract provides no superseniority whatever, even for purposes of layoff and recall. Nor does it provide union stewards with any economic benefit or any job benefit which is secured at the expense of other employees. All that §5(K) does is to prevent Wer-Coy from *arbitrarily* discharging its stewards. This minimal protection clearly furthers the legitimate goal of maintaining the continued presence of a steward on the job, which could otherwise be completely prevented by Wer-Coy's exercise of its asserted right arbitrarily to discharge its employees. The decisions below rejecting Wer-Coy's attacks on §5(K) are thus fully in harmony with *Dairylea*.

Nor do the other cases cited by Wer-Coy in the Petition conflict with the decisions in this case. Thus, *Teamsters Local 20* v. *N.L.R.B.*, 610 F2d 991 (D.C. Cir., 1979); *N.L.R.B.* v. *American Can Co.*, 658 F2d 746 (10th Cir., 1981), *Paintsmiths, Inc.* v. *N.L.R.B., supra*, and *Plumbers, Local 119*, 225 NLRB 1056, 107 LRRM 1190 (1981) all confronted job-related benefits to union officials which went far beyond the kinds of lawful protection necessary to ensure the continued presence of a steward to represent employees. Wer-Coy's heavy reliance on *Perma-Line Corp.* v. *Painters Local 230*, 639 F2d 890 (2d Cir., 1981) is particularly misplaced. In that case, an arbitrator interpreted a contract clause to prohibit any discharge at all of a steward without the consent of the union, regardless of cause. The court pointed out that under this "no-firing" clause

> [n]o matter what the shop steward's conduct — be it spitting in the face of the superintendent, slashing the tires of the foreman's automobile, throwing a monkey wrench into the paint mixing machine — as a shop steward, he is protected from discharge. 639 F2d at 896.

Not surprisingly, the court held that this absolute ban on discharge "is the ultimate benefit a union can give to a union member," *id.* An entirely different situation is presented here. Wer-Coy may discharge a steward forthwith for cause, and thus may immediately dismiss a steward guilty of impermissible conduct. The limited protection afforded stewards against arbitrary acts by Wer-Coy by §5(K) here — requiring only just cause for discharge — has obviously little to do with the complete immunity for misconduct afforded in *Perma-Line.* The conflict asserted by Wer-Coy between the decisions below and that of the Second Circuit in *Perma-Line* does not exist.

C. *The questions presented by the Petition are insubstantial.*

Even if the questions presented by the Petition have been properly preserved, they fail to raise any substantial issue for resolution by this Court. Contrary to Wer-Coy's assertion, no conflict exists between the decisions below and those of the NLRB and other Courts of Appeals. The limited, even minimal, protection afforded union stewards by §5(K) here is well within the presumption of lawfulness established by *Dairylea* and its progeny for contractual provisions which simply enable a steward to maintain his continued presence on the job.

In effect, the *real* question which Wer-Coy seeks to present to this Court is whether 29 USC §158(b)(2) prevents the union from protecting its stewards from arbitrary discharge — which is what acceptance of Wer-Coy's position would entail. Wer-Coy's attempt to dress this petty grab for power over the union stewards in its shop as an "important question of federal law" concerning unlawful pro-union discrimination is a monumental exaggeration. The questions presented by the Petition are insubstantial and do not warrant review by this Court.

CONCLUSION

For the above-stated reasons the Petition herein for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C.
BY ROLLAND R. O'HARE
ANN E. NEYDON
BRUCE A. RICHARD
Attorneys for Respondent
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

February 16, 1983

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EXCERPTS FROM SECTION 5 OF THE ADDENDUM TO THE STANDARD FORM OF UNION AGREEMENT BETWEEN LOCAL UNION #292, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION AND ASSOCIATED METAL FABRICATORS AND ENGINEERS (AS AGENT FOR WER-COY FABRICATION COMPANY, INC.)

Section 5. STEWARDS

* * *

D. Stewards shall observe conditions of employment and conduct of employees to the end that the provisions of the Standard Form of Union Agreement and any addenda thereto shall be complied with and he shall immediately notify the Union office regarding the interpretation or application of the provisions of the Standard Form of Union Agreement and addenda thereto in connection with the employment of employees in shops or on jobs. Stewards shall not be discriminated against by the Employer in the performance of the duties herein stated.

* * *

K. The Employer shall notify the Union office seventy-two (72) hours, excluding Saturday, Sunday and holidays, prior to the discharge of a shop or job steward for cause. The Union will investigate (within the seventy-two (72) hour period) and determine the discharge of any steward for cause.

AWARD OF ARBITRATOR WILLIAM M. ELLMANN IN THE MATTER OF THE ARBITRATION BETWEEN WER-COY FABRICATION COMPANY, INC. -and- SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 292 (AMERICAN ARBITRATION ASSOCIATION CASE NO. 54-30-1637-80)

AWARD

I restore Mr. Dubich to duty as of the date of his discharge, having determined there was an improper discharge and that he was legitimately trying to perform his duties as a Union steward. He is still entitled to representation under the *Weingarten* rule — representation which he was not afforded. Representation which he was in no position to request.

He is also entitled to his full benefits including wages and fringes for the period he was ready and available for work since that date.

Jurisdiction is retained solely to determine damages if the parties cannot resolve the question.

/s/ WILLIAM M. ELLMANN
Arbitrator

Date: 3/29/81

ANSWER OF DEFENDANT WER-COY FABRICATION COMPANY, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO, a labor organization,

Plaintiff, Case No. 81-71144

vs. Hon. John Feikens

WER-COY FABRICATION COMPANY, INC. a Michigan corporation,

Defendant.

ANSWER TO COMPLAINT

Defendant, WER-COY FABRICATION COMPANY, INC., by and through its attorneys, Fiott and Novara, P.C., answers Plaintiff's Complaint paragraph by paragraph as follows:

1. Defendant admits the allegations contained in paragraph one.

2. Defendant admits the allegations contained in paragraph two.

3. Defendant admits that this Court has jurisdiction over this matter pursuant to 29 U.S.C. 185, but denies that it breached its collective bargaining agreement with Plaintiff.

4. Defendant admits the allegations contained in paragraph four.

5. Defendant neither admits nor denies the allegations contained in paragraph five, being without sufficient information to form an opinion thereto and leaves Plaintiff to its proofs.

6. Defendant admits that an arbitration hearing was held on February 18, 1981, but denies that the issue submitted to arbitration was whether the discharge of Anthony Dubich was proper. Defendant further states that the sole issue before the

arbitrator was whether Defendant substantially complied with Section 5J (sic) of the Addendum to the parties' collective bargaining agreement.

7. Defendant admits that Arbitrator William M. Ellmann issued an Opinion and Award ordering reinstatement and backpay and further states that the Arbitrator exceeded the authority granted to him by Article X, Section 3 of the parties' collective bargaining agreement and failed to decide the issue submitted to arbitration.

8. Defendant admits that it refused to abide by the Arbitrator's Award and further states that such Award exceeded the authority granted to the Arbitrator by Article X, Section 3 of the parties' collective bargaining agreement.

9. Defendant denies each and every allegation contained in paragraph nine of Plaintiff's Complaint for the reason that the same are untrue.

WHEREFORE, Defendant Wer-Coy Fabrication Co., Inc., requests that this Court dismiss Plaintiff's Complaint and award Defendant its costs and reasonable attorney fees incurred in this matter.

FIOTT AND NOVARA, P.C.
BY: /s/ KENNETH J. FIOTT, ESQ.
(P13445)
Attorney for Defendant
1427 Parklane Towers West
Dearborn, MI 48126
313-336-4465

Dated: 5-1-81

AFFIRMATIVE DEFENSES

Defendant Wer-Coy Fabrication Co., Inc., for its affirmative defenses to Plaintiff's Complaint, states as follows:

1. That the Arbitrator failed to decide the issue submitted to him, that being whether Defendant substantially complied with Section 5K of the Addendum to the parties' collective bargaining agreement.

2. That the arbitrator exceeded the authority granted to him by Article X, Section 3 of the collective bargaining agreement.

3. That the Arbitrator's Opinion indicates that he did not decide this dispute from the facts presented at the hearing.

4. Plaintiff failed to state a claim upon which relief can be granted.

5. Defendant reserves the right to plead any additional legal or factual affirmative defenses which may be discovered during the course of this action.

FIOTT AND NOVARA, P.C.
BY: /s/ KENNETH J. FIOTT, ESQ.
(P13445)
Attorney for Defendant
1427 Parklane Towers West
Dearborn, MI 48126
313-0336-4465

Dated: 5-1-81

FEDERAL RULES OF CIVIL PROCEDURE, RULE 8(c)

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance of affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.